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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B7

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 17 2009

SRC 07 015 51400

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

for John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5).

The director determined that the petitioner had failed to demonstrate a qualifying investment of lawfully obtained funds. On appeal, counsel submitted a brief and additional evidence. On February 3, 2009, the AAO advised the petitioner of derogatory evidence discovered while adjudicating the appeal and additional deficiencies in the record of proceeding. Specifically, the AAO discovered that several of the properties of the new commercial enterprise were under foreclosure proceedings, that the petitioner had not demonstrated that any of the residential homes purchased by the petitioner were zoned for conversion to assisted living as planned and that the purchase and operation of a preexisting beauty supply store does not create any new employment.

In response, counsel asserts that while the declining economy has impacted the new commercial enterprise, the business is still running. Counsel asserts that the petitioner continues to invest in the new commercial enterprise and has amended its business plan. The petitioner submits a new business plan and supporting evidence. For the reasons discussed below, the petitioner has not overcome our concerns that the new commercial enterprise is primarily engaged in passive real estate investments, with the purchase of one preexisting retail business, which will create few if any jobs.

The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), which amends portions of the statutory framework of the EB-5 Alien Entrepreneur program, was signed into law on November 2, 2002. Section 11036(a)(1)(B) of this law eliminates the requirement that the alien personally establish the new commercial enterprise. Section 11036(c) provides that the amendment shall apply to aliens having a pending petition. As the petition was filed after November 2, 2002, the petitioner need not demonstrate that she personally established a new commercial enterprise. The issue of whether the petitioner purchased a preexisting business is still relevant, however, as a petitioner must still demonstrate the creation of 10 new jobs.

Section 203(b)(5)(A) of the Act, as amended, provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The record indicates that the petition is based on an investment in a business, [redacted], Federal Employer Identification Number (FEIN) [redacted]. The petitioner indicated that the new commercial enterprise was not located in a targeted employment area for which the required amount of capital invested has been adjusted downward. Thus, the required amount of capital in this case is $1,000,000.

EMPLOYMENT CREATION

While not directly discussed by the director, our February 3, 2009 notice advised that the petitioner has failed to demonstrate that her investment has created or will create the required number of jobs. As also provided in our notice, the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

As will be discussed in more detail below, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. 169, 179 (Comm'r. 1998). As passive real estate investments that do not generate any full-time employment cannot be included in a qualifying investment, it is beneficial to discuss the issue of job creation before addressing those raised by the director.

The regulation at 8 C.F.R. § 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which

> has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.
>
> * * *
>
> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Section 203(b)(5)(D) of the Act, as amended, now provides:

> Full-Time Employment Defined – In this paragraph, the term 'full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Full-time employment means continuous, permanent employment. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1039 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (finding this construction not to be an abuse of discretion).

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit U.S. Citizenship and Immigration Services (USCIS) to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho,* 22 I&N Dec. at 213. Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business,

> including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

On the Form I-526 petition, the petitioner indicated that [redacted] was a "multi-faceted business." She further indicated that there was a single employee when she made her investment and a single employee currently. She indicated her investment would create an additional 24 jobs. The cover letter accompanying the petition indicates that [redacted] was investing in a preexisting beauty supply store, [redacted] real estate and an assisted living facility. The letter and business plan indicate that [redacted] had one employee but would be expanded to 11 employees, including eight stylists, two spa technicians and one supervisor. The assisted living facility was projected to employ one registered nurse, two licensed practical nurses, 10 care assistants, one maintenance worker, one laundry worker, two cleaners, one book-keeper and one receptionist. The rental properties were projected to require four undefined workers. No hiring dates were provided.

As noted in our February 3, 2009 notice, the property the petitioner claimed to have purchased for the assisted living facility appeared to be homes within a residential subdivision. Thus, the AAO requested evidence that the property was zoned for assisted living. In response, the petitioner asserts that she has only recently learned that the current zoning for these properties precludes their conversion to an assisted living facility. She further asserts that [redacted] now plans to purchase new property zoned for assisted living and transfer the equipment purchased to operate an assisted living facility to the new location.

The AAO also noted that while the petitioner indicated that she planned to expand the beauty supply store to include salon services, the lease for the location requires that it be used "only for a beauty supply products store and for no other use." In response, the petitioner asserts that [redacted] had planned to take over the salon "next to" the beauty supply store but that this plan was delayed because other stores in the mall that cater to women closed down. Instead, the petitioner asserts that [redacted] now plans to increase stock lines to improve sales at the wig and beauty shop.

Finally, the petitioner now asserts that [redacted] intends to engage in exports to Africa and received an order in January 2009 to supply [redacted] equipment. The petitioner submitted an unsigned January 24, 2009 contract with [redacted]

The petitioner also submitted an unsigned 2007 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return for [redacted]. The return lists a different FEIN than the one listed on the Form I-526 petition. The wages on this tax return are only $14,611. The type of business is listed on Schedule K as cosmetics and beauty only. The petitioner indicates that currently [redacted] employs two workers at the beauty supply store, one property maintenance man for the real estate properties in Georgia, one lawn care man for those properties,

one "managing company" each for the properties in Georgia and Florida and a civil/building contractor who is building "a new 2 bed apartment, for the resident nurse that was to be employed for the assisted living." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The petitioner did not submit pay records or quarterly employer returns documenting these employees. Moreover, the petitioner does not even suggest that any of these employees work full-time. In addition, the employees of the managing company utilized by [redacted] and the contractor are not direct employees of [redacted] and, thus, cannot be considered employees as defined at 8 C.F.R. § 204.6(e), quoted above. Finally, any employment created for the manufacturers of the equipment the petitioner intends to export are not direct employees of the new commercial enterprise and, thus, cannot be considered.[1]

The petitioner has not overcome our concern that the lease for the beauty supply store does not permit any other use and, thus, precludes expanding the store to a salon with eight stylists. The petitioner's amended plan to merely increase the store's product line does not comply with the strict requirements for a business plan in establishing how this increase will create jobs and when those jobs will be created. Moreover, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 175.

The petitioner asserts that she has been able to negotiate the return of the foreclosed properties and rent some of the purchased properties and that she has hired a maintenance person and a person to mow lawns. The petitioner submits evidence of payments to secure some of the properties in foreclosure proceedings. These assertions, however, cannot overcome our concern that merely purchasing property to rent is a passive real estate investment that does not generate full-time, permanent employment. The record contains no evidence that a maintenance person and lawn mower for a handful of residential properties are each a full-time, permanent position.

Further, the petitioner has not overcome our concern that the property originally purchased for development as an assisted living facility actually includes a small number of residential homes within a residential development that would be unlikely to be zoned for assisted living facilities. In fact, the petitioner concedes that the property is not zoned for this use. While the petitioner claims to have only recently become aware of the zoning issue, it remains that a comprehensive business plan should take into account such issues. Moreover, such issues should be resolved before the petition is filed. As stated above, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *Id.* In addition, the petitioner implies in her recent correspondence that the

[1] The petitioner does not claim to have invested in a designated regional center pursuant to Section 610 of the Judiciary Appropriations Act, 1993, Pub. L. 102-395 (1993) as amended by section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000), the only means by which an alien can rely on indirect job creation. 8 C.F.R. §§ 204.6(j)(4)(B)(iii), (m)(7).

"assisted living facility" will merely consist of multiple apartments within a development that have been modified to accommodate a home nurse. The petitioner has not established that this project will create jobs for three nurses, 10 care assistants and six additional employees as projected in the original business plan.

In light of the above, the petitioner's original business plan cannot be considered viable and her failure to even determine whether or not the properties being purchased for an assisted living facility were appropriate for that use undermines the credibility of her business related assertions. Thus, the petitioner has not demonstrated that she has created or will create the necessary full-time permanent jobs for direct employees of [redacted]

INVESTMENT OF CAPITAL

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
> >
> > (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts

containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner claimed on the Form I-526 petition to have made an initial investment of $180,000 on February 16, 2006 and a total investment of $2,956,909. As stated above, the full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based, which must necessarily be full-time permanent employment. *Matter of Izummi*, 22 I&N Dec. at 179; *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1039. Thus, the passive investments in real estate rental properties cannot be considered part of a qualifying investment. Regardless, as will be detailed below, the investments include funds that cannot be credited to the petitioner: mortgages secured by the property and funds that cannot trace back to the petitioner personally.

The petitioner submitted settlement statements for the following properties documenting the deposit, cash paid at closing, mortgage and buyer/borrower:

Property	Deposit	Cash at Closing	Mortgage	Buyer
[redacted]	$220,000	$12,161.65	$213,400	Petitioner's spouse
	$45,000	$346,244.09	$0	Petitioner's spouse
	$2,500	$58,935.58	$219,949	Petitioner and spouse
	$2,500	$54,563.22	$204,624	Petitioner and spouse
	$2,500	$67,685	$252,336	Petitioner and spouse
	$2,500	$54,949.41	$207,800	Petitioner and spouse
	$1,500	$47,420	$186,824	Petitioner and spouse
	$16,980	$153,181	$0	Petitioner's spouse
	$0	$18,823.63	$0	Petitioner and spouse

The deposits and cash at closing total $888,443.83. The record, however, establishes only that one of these properties was subsequently transferred by the petitioner and her spouse to [redacted] The record also contains a lease showing [redacted] as the lessor. As noted above, [redacted] tax return indicates its sole business is beauty supplies. Personal real estate investments by the petitioner cannot serve as a qualifying investment in [redacted] Moreover, $888,443.83 is below the $1,000,000 investment amount.

The record also shows an $8,000 deposit paid to [redacted] in October 2005 and a final payment of $88,000 to [redacted] in January 2006. The $88,000, however, as well as the $153,000 paid for [redacted] s and an additional $356,142.43 deposited with [redacted] s Wachovia account derive not from the petitioner's personal account but from [redacted] (Overseas Project). Even assuming the petitioner has an interest in this foreign company, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Thus, an investment by Network Partners (Overseas Project) cannot be considered a personal investment by the petitioner.

In response to our February 3, 2009 notice, the petitioner submits additional fund transfers from The [redacted] (Overseas Project) and asserts that she has spent money rescuing property from foreclosure and on improvements. Once again, the record does not establish that these funds constitute a personal investment by the petitioner into [redacted] Moreover, improvements to rental property that create no full-time permanent jobs cannot be considered part of the petitioner's qualifying investment.

In light of the above, the petitioner has not demonstrated an investment of at least $1,000,000 into employment-generating activities. Rather, the petitioner expended a small amount to purchase a preexisting retail establishment that has created no new jobs and has spent the remainder on large, passive real estate investments that will not generate any full-time employment.

SOURCE OF FUNDS

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
>
> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind

filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. 206, 210-211 (Comm'r. 1998); *Matter of Izummi*, 22 I&N Dec. 169, 195 (Comm'r. 1998). Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

The petitioner submitted evidence that she and her spouse each own an interest in [redacted], a Nigerian company. An unsupported letter indicating the number and value of shares of capital stock held by the petitioner in a foreign business is also insufficient documentation of source of funds. *Matter of Ho,* 22 I&N Dec. at 211. The petitioner did submit financial statements for the hospital. These reports, however, say nothing about the amount of income the petitioner or her spouse derived from this company. *Matter of Izummi,* 22 I&N Dec. at 195.

The petitioner did submit a Nigerian tax clearance for her income in 2003, 2004 and 2005. These clearances, however, reflect a taxable income of only $4,382.76 (600,000 Naira), $5,791.51 (750,000 Naira) and $7,665.37 (985,000 Naira) respectively according to currency conversion rates available for December 31 of each taxable year available at www.oanda.com. (Accessed March 12, 2009 and incorporated into the record of proceedings).

Much of the petitioner's alleged investment traces back to [redacted] (Overseas Project). The record also contains several transfers from [redacted] listing a different account number than the one for [redacted] (Overseas Project). The record, however, does not establish the bases of these transfers.

Although the director concluded that the petitioner had not established the lawful source of the invested income, the petitioner did not respond to this concern on appeal. For the reasons discussed

above, we find that the petitioner has not demonstrated that her personal income was sufficient to account for her investment and that the record lacks evidence of her spouse's income.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.